

No. 21-1938

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

UNITED STATES OF AMERICA
Appellee

v.

MELVIN STOUT
Appellant

**Appeal from the
United States District Court
Western District of Arkansas**

**Honorable Timothy L. Brooks
United States District Judge**

BRIEF OF APPELLEE

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CASE SUMMARY AND STATEMENT ON ORAL ARGUMENT

Melvin Stout appeals the sentence imposed following his guilty plea to one count of making a false statement in violation of 18 U.S.C. § 1001(a)(3). For his sole point on appeal, Stout contends the district court committed plain error in its determination of Stout's guideline sentencing range by miscalculating the amount of intended loss under U.S.S.G. § 2B1.1.

The United States submits that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, the United States waives oral argument. *See* Fed. R. App. P. 34(a)(2).

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JURISDICTIONAL STATEMENT

Melvin Stout appeals from the final judgment entered against him by the United States District Court for the Western District of Arkansas. The court's judgment constitutes an appealable final order. The judgment was entered on April 13, 2021. (DCD 26). Notice of appeal was timely filed on April 27, 2021. (DCD 31). The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231. Appellate jurisdiction is based upon 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

- I. Stout has failed to establish the district court committed any error, including plain error, in determining the amount of intended loss.**

Puckett v. United States, 556 U.S. 129 (2009)

United States v. Smith, 929 F.3d 545 (8th Cir. 2019)

STATEMENT OF THE CASE

In late March 2020, the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law. (DCD 24 (hereinafter “PSR”), ¶ 9). Among its initiatives, the CARES Act created two programs - the Paycheck Protection Program (PPP), and the Economic Injury Disaster Loans (EIDL) program - to provide loans to small businesses impacted by the COVID-19 pandemic. (DCD 24, “PSR”). (PSR, ¶ 10). Both programs were overseen and administered by the Small Business Administration (SBA). *Id.*

Under the PPP, a small business could apply for a loan from a local lender participating in the program. (PSR, ¶¶ 11-13). If the loan was approved, the lender would make the loan with its own funds, but repayment was guaranteed by the SBA. *Id.* A PPP loan could be forgiven, provided the business used the loan proceeds for specified purposes, such as meeting payroll or meeting other employment-related criteria. *Id.* To qualify for a PPP loan, a business submitted an application with information such as the number of employees and its average monthly payroll costs. *Id.* The business was also required to submit various financial documentation in support of its application. *Id.*

Under the EIDL program, a business applied directly to the SBA for a loan. If the SBA approved the loan, the SBA provided the loan proceeds directly to the qualifying business. (PSR, ¶¶ 14-16). Although EIDL loans were not forgivable,

payments on the loans were deferred for one year, and the interest rates for EIDL loans were lower. *Id.* Under the EIDL program, a business could request an advance on the loan of up to \$10,000.00, which the business did not need to repay, provided the money was used for business-related purposes. *Id.*

On April 17, 2020, Stout applied for and obtained a PPP loan from Generations Bank in Fayetteville, Arkansas. (PSR, ¶ 21). At the time he applied for the loan, Stout was earning \$16 an hour doing contract work as an IT technician. (PSR, ¶ 86). Stout had twice filed for bankruptcy in the two years prior to his PPP application, first in 2018 and again in 2019. (PSR, ¶ 96). At the time of his application, Stout and his wife, Tiffany Acuff, were living in a duplex leased by his mother, who also resided there along with Stout’s stepfather and Stout’s sister. (PSR, ¶ 76). Acuff had lost her job in March 2020. (PSR, ¶ 37).

In his application for the PPP loan, Stout falsely represented that he owned a plumbing business, and he falsely represented that his purported plumbing business had a monthly payroll of \$3,783.56. (PSR, ¶ 21). As part of his application, Stout also submitted fraudulent IRS tax documents purporting to reflect he had earned \$48,595 from the business in 2019. *Id.* Stout requested a loan in the amount of \$9,458.90, and he obtained loan proceeds in the amount of \$9,400. *Id.* He later admitted he spent the funds on personal matters, (DCD 8, ¶ 4.j.), and he admitted he engaged in the criminal activity because he needed the money “to stay afloat” and

because he wanted to move out his mother's residence. (PSR, ¶ 36).

Acuff and Stout's sister, Valarie Watson, joined in Stout's fraudulent scheme. On April 29, 2020, Acuff filed a fraudulent PPP application with the same bank in Fayetteville and requested a loan in the amount of \$20,833.33. (PSR, ¶ 24). In her application, Acuff falsely represented that she owned a remodeling business, for which she gave false payroll obligation numbers. *Id.* Acuff also submitted fraudulent IRS tax forms as part of her application, falsely claiming that she earned \$122,400 in non-employee compensation from the purported remodeling business. *Id.* Acuff obtained loan proceeds of \$20,000. *Id.*

On May 11, 2020, Watson applied for a PPP loan in the amount of \$20,833.33 with the same Fayetteville bank. (PSR, ¶ 26). Like Stout and Acuff, Watson also made false representations about owning a business, and she also provided fraudulent IRS tax forms in support of her application. *Id.* However, the bank ascertained that part of her application was false and ultimately rejected her application. *Id.*

Stout, Acuff, and Watson next sought to obtain advances and loans through fraudulent applications to the SBA as part of the EIDL program. On May 22, 2020, Stout and Acuff filed a joint application with the SBA seeking EIDL funds. (PSR, ¶ 28). In their application, Stout and Acuff falsely represented that they owned a personal services business that had six employees and annual revenue of \$75,832 for

the 12 months prior to January 31, 2020. *Id.* The SBA provided Stout and Acuff an advance of \$6,000, which was directly deposited into Stout's bank account. *Id.* The SBA also offered to loan Stout and Acuff up to \$27,000, which amount Stout and Acuff accepted and provided a bank account in which the loan proceeds could be deposited. *Id.* The SBA could not verify that the bank account was associated with the business Stout and Acuff purportedly owned, and the SBA ultimately declined to proceed with the loan. *Id.*

On June 16, 2020, Acuff submitted a fraudulent application to the SBA for EIDL funds. (PSR, ¶ 29). Based on her false representations that she owned a business that had ten employees and annual revenue of \$56,750, Acuff obtained an advance in the amount of \$10,000 and a loan in the amount of \$18,400. *Id.* On June 19, 2020, Stout submitted a fraudulent application to the SBA seeking an advance and a loan under the EIDL program. (PSR, ¶ 30). Stout's application was denied because his credit score failed to meet the EIDL program's requirements. *Id.* On June 22, 2020, Watson submitted a fraudulent application for an advance and a loan under the EIDL program. (PSR, ¶ 31). She falsely represented that she owned a cleaning services business that had 10 employees and annual revenue of \$54,000. *Id.* Based on her application, Watson obtained an advance of \$10,000. Her loan request was declined because of her credit score. *Id.*

On September 3, 2020, federal law enforcement agents conducted separate

interviews of Stout, Acuff, and Watson. (PSR, ¶¶ 32-40). During Stout’s interview, agents reviewed with Stout several of the applications and tax forms submitted in support the PPP applications. (PSR, ¶¶ 32-35). Stout lied when questioned about the legitimacy of the documents. *Id.* Eventually, Stout admitted to agents he was lying and that the PPP applications were fraudulent. *Id.*

In her interview with the federal agents, Acuff admitted that she applied for, and received, PPP and EIDL funds through fraudulent applications and fraudulent information. (PSR, ¶ 37). She also “expressed remorse for her actions and stated she was willing to repay the loans.” (PSR, ¶ 38).

In her interview with the federal agents, Watson admitted that the contents of her PPP application were untrue, that the payroll figures were fabricated, and that the tax forms she submitted with her application contained false information. (PSR, ¶ 39). She also admitted that she intended on spending the loan proceeds on personal matters and not on business expenses. *Id.* Watson maintained that her EIDL application was legitimate, as she claimed it was based on a cleaning service she started in 2020. (PSR, ¶ 40). She told agents that she was the sole employee of the business and had earned \$6,000 in 2020. *Id.* In contrast to Watson’s statements to the agents, Watson’s “EIDL application reported that the business employed 10 individuals and earned gross revenues in the amount of \$54,000 in the 12 months prior to the disaster, which would have been primarily in 2019.” *Id.* Moreover, “a

review of IRS records showed no evidence of Watson earning income from a cleaning service in 2019.” *Id.*

On December 16, 2020, Stout waived his right to indictment and entered a guilty plea to a one-count information charging him with making a false representation in his April 17, 2020, application for a PPP loan, in violation of 18 U.S.C. § 1001(a)(3). (DCD 5, 7, 8).

Stout’s offense level under the sentencing guidelines was determined by the amount of loss under U.S.S.G. § 2B1.1(b). (PSR, ¶¶ 41-42, 47-48). The PSR calculated both the amount of actual loss and the amount of intended loss from Stout, Acuff, and Watson’s scheme. (PSR, ¶ 41). The amount of actual loss, which totaled \$74,600, was derived from the sums obtained in the form of loans under the PPP and EIDL programs and advances under the EIDL program. *Id.* The amount of intended loss included the actual loss amount plus the loan amounts sought but not received under the PPP and EIDL programs. *Id.* The intended loss amount totaled \$116,525.56. *Id.* The PSR recommended that the district court calculate Stout’s offense level using the intended loss amount of \$116,525.56, resulting in an eight-level increase to Stout’s base offense level of six. (PSR, ¶ 48). Stout did not object to the PSR’s recommendation regarding the application of intended loss or the amount of intended loss. (DCD 15).

The PSR also recommended a two-level increase under U.S.S.G. § 3B1.1(c)

for Stout's role as an organizer, leader, manager, or supervisor in the offense. (PSR, ¶ 50). Stout objected to certain of the facts underlying the role enhancement, but he did not object to the application of the enhancement in his case. (DCD 15). With a three-level reduction for acceptance of responsibility, Stout's total offense level was 13. (PSR, ¶¶ 54-56).

Stout had a prior misdemeanor conviction for the offense of harassing communications, which resulted in a criminal history score of one point. (PSR, ¶ 64). The PSR also reflected that in March 2021, Stout was charged in Arkansas state court with stealing fifteen computers from a hospital over the course of his employment with the hospital from September 2019 through February 2020. (PSR, ¶ 67). It was alleged that Stout and Acuff sold the computers to various pawn shops, resulting in a loss of \$17,272.55 to the hospital. *Id.*

Stout's criminal history score of one point placed him in criminal history category I. (PSR, ¶ 65). Stout's resulting guideline imprisonment range was 12 to 18 months. (PSR, ¶ 100). The PSR also recommended that restitution be ordered in the amount of \$74,600, which sum was derived from the amount of actual loss. (PSR, ¶ 119).

Stout appeared for sentencing on April 9, 2021. (DCD 25). During the hearing, the district court confirmed that Stout was not objecting to PSR's recommendation as to the loss amount. (Sentencing Transcript ("S.Tr.") at 6). The

court thereafter adopted the PSR's recommendations and accepted the Government's motion for a one-level reduction for acceptance responsibility. (S.Tr. at 8-11). At the conclusion of the hearing, the court sentenced Stout to a within-guidelines sentence of a year and a day of incarceration, followed by three years of supervised release. (S.Tr. pp. 39-41). The court also ordered Stout to pay restitution in the amount of \$74,600, jointly and severally with Acuff and Watson. *Id.*

SUMMARY OF THE ARGUMENT

Stout has failed to establish the district court committed error in determining the amount of intended loss under U.S.S.G. § 2B1.1. Stout's argument that there was no evidence to support the court's finding is belied by the record. Rather, the record provides ample support to the finding that Stout and his co-conspirators intended to cause the entire amount of loss as found by the court. Stout's argument that the court's purported error was plain is not supported by the precedent cited by Stout. In fact, the precedent Stout cites demonstrates the lack of plain error in his case. Because Stout has failed to establish any error or that the purported error was plain, the district court should be affirmed.

ARGUMENT

I. Stout has failed to establish the district court committed any error, including plain error, in determining the amount of intended loss.

A. Standard of Review

In reviewing a sentence for procedural error, this Court reviews a district court's factual findings for clear error and its interpretation and application of the guidelines *de novo*. *United States v. Kirlin*, 859 F.3d 539, 543 (8th Cir. 2017) (citation omitted). If a defendant fails to timely object to a procedural sentencing error, this Court reviews only for plain error. *Id.* (citation omitted).

Stout concedes that because he failed to object to the district court's determination of the amount of intended loss, this Court should review his claim only for plain error. Appellant Br. at 24. The test for plain error has four prongs:

First, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the *1121 error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Puckett v. United States, 556 U.S. 129, 135 (2009) (alterations in original) (internal quotation marks and citations omitted). Stout bears the burden on appeal of

establishing all four prongs of plain error review. *United States v. Barthman*, 919 F.3d 1118, 121 (8th Cir. 2019) (citation omitted).

B. Discussion

Stout's offense level depended on the greater of the "actual" or "intended loss."¹ U.S.S.G. § 2B1.1 cmt. n.3(A). "Intended loss" is "the pecuniary harm that the defendant purposely sought to inflict," and it includes "intended pecuniary harm" even if such harm "would have been impossible or unlikely to occur." *Id.*

Stout first contends that the district court erred by including in the amount of intended loss "the non-forgivable portions" of the loans sought by Stout, Acuff and Watson under the EIDL program. Appellant Br. at 27. To support this contention, Stout claims that "there is no evidence in the record" that he and his co-conspirators "did not intend to repay" loan amounts that were non-forgivable. *Id.* Stout's claim is misplaced.

Contrary to Stout's contention, there is more than sufficient evidence to support the finding that Stout and his co-conspirators intended to cause loss with respect to all loan amounts they received and sought to receive, regardless of the whether the loan they sought was forgivable or not. Stout and his co-conspirators did not distinguish between the types of loans in any way, as they submitted false

¹ Stout does not argue that the district court's actual loss determination should have applied in his case.

applications containing the same type of false information in order to obtain both types of loans. They also spent the funds they obtained from both types of loans on personal items.

Moreover, when interviewed by federal agents, Stout and his co-conspirators gave no indication that they had any less culpable criminal intent with respect to non-forgivable loans as they did with forgivable loans. Stout initially tried to convince federal agents that the fraudulent applications for PPP loans were legitimate. In her interview, Acuff stated that she would be “willing to repay the loans,” which indicates that until she was caught, she did not have any intent to repay any of the loans, forgivable or not. Finally, after federal agents confronted them about their fraudulent scheme in September 2020, Stout and his co-conspirators did not repay any portion of the funds they obtained through their scheme.

Taken together, the foregoing facts amply support the finding that Stout and his co-conspirators acted with the same intent to cause loss with respect to non-forgivable loans under the EIDL program as they did with every other aspect of their scheme. *See United States v. Smith*, 929 F.3d 545, 547 (8th Cir. 2019) (“And were there any doubt about Smith’s intentions, he fraudulently acquired other expensive items—including a house, office space, and several vehicles—through similar means.”). Thus, the district court did not err by including the non-forgivable loan amounts in its determination of the amount of intended loss, and Stout has failed to

establish the first prong of plain error review. This Court should affirm for that reason alone.

To establish the second prong of plain error, Stout must demonstrate that the district court's purported error with respect to the non-forgivable loan amounts was "obvious" or "clear." Stout relies on *United States v. Oligmueller*, 198 F.3d 669 (8th Cir. 1999) to establish plain error, but that case does not support Stout's contention, as it does not address whether a non-forgivable loan should be treated differently under intended loss analysis. Indeed, the facts of *Oligmueller* undermine Stout's claim that the district court's purported error was plain.

The defendant in *Oligmueller* overstated the number of cattle he owned in order to secure a bank loan. *Id.* at 670. The defendant eventually pled guilty to making a false statement to the bank. *Id.* at 671. At sentencing, the district court found that the defendant's intended loss was zero and therefore calculated the defendant's offense level using an actual loss amount. *Id.* The government appealed the district court's determination with respect to intended loss. *Id.*

In upholding the district court's intended loss finding, this Court stated that "there is no evidence that, at the time of the fraudulent conduct, Oligmueller intended to repay anything less than the full value of the loans." *Id.* In upholding the district court, this Court did not make any comment about the nature of the loans obtained by the defendant. Instead, this Court focused on the facts surrounding the

defendant's conduct as the basis to support the district court's inference that the defendant intended to repay the full value of the loans.

The facts in *Oligmueller* showed that the defendant owned and operated a legitimate ranching business at the time he made a single false statement to secure a loan. *Id.* Once his false statement was discovered, the defendant "made extraordinary efforts to ensure that his debt was repaid to the bank." *Id.* at 670. To that end, the defendant liquidated assets not previously pledged to the bank, pledged his ranch to the bank, worked other jobs, and "turned over approximately half of his social security payment each month to pay his debts." *Id.*

In contrast to the facts of *Oligmueller*, Stout and his co-conspirators did not own any legitimate businesses. Instead, they made numerous false representations and submitted numerous fraudulent documents about their purported businesses in order to secure loans over a two-month period. In contrast to the defendant in *Oligmueller*, once their fraud was discovered, Stout and his co-conspirators did nothing to repay the funds they had illegally obtained. In summary, nothing in this Court's opinion in *Oligmueller* renders the intended loss determination in Stout's case a "clear" or "obvious" error. The district court can and should be affirmed for that reason.²

² In the event this Court determines that Stout has met his burden of establishing the first two prongs under plain error review, the Government would concede that Stout has established the remaining two prongs.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system which will send notification of such filing to participants in the case registered in CM/ECF system.

/s/ Lloyd V. Stone

Lloyd V. Stone

Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief has been scanned for viruses and that to the best of my knowledge the Brief is virus free.

I further certify that Word software was used to prepare this Brief.

I further certify that this Brief complies with the type-volume limitations as set forth in Fed. R. App. P. 32(a)(7)(c). There are 23 pages containing 3858 words, using Times New Roman 14 point, in the Brief.

/s/ Lloyd V. Stone

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